Syed Nadri Syed Harun & Anor v Lim Guan Eng and other appeals

COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02(NCVC)(A)-685–04 OF 2015, W-02(NCVC)(A)-686–04 OF 2015, W-02(NCVC)(A)-695–04 OF 2015 AND W-02(NCVC)(A)-696–04 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
27 FEBRUARY 2018

Tort — Defamation — Freedom of speech — Whether persons holding public office in government could not sue for defamation in their official capacities those who criticised them on the performance of their public duties — Derbyshire principle — Whether elements that made up the Derbyshire principle were entrenched in art 10(1)(a) of the Federal Constitution guaranteeing freedom of speech and expression — Whether public interest for promotion of transparency and good governance demanded that citizens should have unfettered right to criticise democratically elected government and its officials over their conduct of affairs of State and Government

The four appeals herein were filed by seven parties who were jointly sued for defamation in the High Court by the then Chief Minister of Penang, Lim Guan Eng ('LGE'). Sometime in August 2011, LGE had announced that he was making an official trip to Singapore to attract investors to Penang. One of the appellants, Ruslan bin Kassim ('Ruslan'), who was then the information chief of Pertubuhan Pribumi Perkasa Malaysia ('Perkasa'), issued a press statement enquiring whether, while they were in Singapore, LGE and two other Malaysians ('Azman Yahya' and 'Kalimullah Hassan') had held a 'secret meeting' with a senior leader of Singapore's ruling party (the PAP) to discuss 'national secrets' and, if that was true, Malaysians were entitled to question the allegiance and loyalty of the three Malaysians to their homeland. Ruslan sent his statement to two Malaysian newspaper publishers for publication. Articles concerning his statement appeared in the *Sunday Times*, *Berita Minggu* and *Mingguan Malaysia* and also on Perkasa's website. After a full trial, the trial judge held that Ruslan's statement as published was defamatory of LGE. The judge rejected the defences of justification, fair comment, qualified privilege and the *Reynold*'s defence that were raised by the various defendants. This was largely because: (a) Ruslan had subsequently publicly apologised to Azman Yahya over the impugned articles while one of the newspaper publishers, the *New Straits Times Press (M) Bhd*, issued a similar apology to Kalimullah Hassan stating that the content of the impugned articles in its publications was baseless; (b) the defendants concerned had not pleaded the necessary particulars of their defence as required under O 18 r 12 and O 78 r 3(2) of the

Rules of Court 2012 ('the ROC'); (c) the impugned articles were neither comments nor based on facts; (d) the defendants had no honest belief in the truth of the impugned articles; (e) there was malice in the sense the impugned articles were published recklessly without any effort being taken to verify whether they were true; and (f) the defendants had no legal or moral duty to publish the impugned articles nor was there a reciprocal duty or interest on the part of the public to receive the information contained in those articles. The trial judge awarded LGE a global sum of RM550,000 as general and aggravated damages against the defendants. The appellants filed the instant appeal to the Court of Appeal ('COA') against liability and quantum while LGE cross-appealed for the amount of damages to be increased. After the instant COA panel of judges had reached an unanimous decision in respect of the four appeals herein, but before delivery of their decision, the same panel had heard and decided on another appeal (*Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56) from the High Court where the Menteri Besar of Pahang had sued the defendant there for defamation over an article published in a newspaper. The appeal was against the High Court's refusal to allow the defendant to strike out the suit under O 18 r 19 of the ROC. The main issue in that appeal was whether the Menteri Besar of Pahang was precluded from suing for defamation in his official capacity based on the *Derbyshire* principle laid down by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd and others* [1993] 1 All ER 1011. The *Derbyshire* principle held that democratically-elected government should be open to uninhibited public criticism and it was against public interest to allow such government/government bodies and those who held public office to sue for defamation those who criticised them on the performance of their public duties as that would place an undesirable fetter on freedom of speech and discourage transparency and good governance. In that case, the COA panel ruled that the plaintiff was suing for defamation in his official capacity and therefore the *Derbyshire* principle applied against him and the defendant's appeal had to be allowed.

Held, unanimously applying the principle of law in *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* to the instant appeals and thereby allowing the four appeals herein, dismissing the cross-appeal and setting aside the decision of the trial court:

(1) The suit from which the instant appeals emanated was strikingly similar to the one in *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* in that the plaintiffs in both suits were Chief Minister or Menteri Besar of the relevant state government and were suing in their official capacities. The trial judge in the instant appeals had made her finding of defamation and awarded damages solely on the fact that LGE was the Chief Minister of Penang. LGE had also cross-appealed against the inadequacy of damages because his reputation and dignity as a politician

had suffered much injury. There was nothing to suggest that LGE's claim was anything but in his official capacity. Hence, there was no issue in the applicability of the *Derbyshire* principle to the facts and circumstances of the instant appeals. As a result, LGE's claim against the defendants had to be dismissed (see paras 46–48).

(2) Even if it was assumed for a moment that the *Derbyshire* principle was not part of our law on defamation or that the defendants' case did not principally rely on that common law principle, the principle in fact and in law clearly emanated from, and was already well-entrenched in, art 10(1)(a) of the Federal Constitution which guaranteed the right to freedom of speech and expression. Such right encompassed the right of citizens to discuss the government and those holding public office in the conduct of public affairs and administration of the State. On that score, and as dictated by public interest, a democratically-elected government and its officials should be open to public criticism. Every responsible citizen should not in any way be fettered in his statements where it concerned the affairs and public administration of the government. Any action to the contrary would militate against public interest and directly affect the fundamental right as guaranteed, unless otherwise provided by federal law (see para 44).

(3) As far as the merits of the appeals herein were concerned (ie, without application of the *Derbyshire* principle), all the issues that were raised by the appellants were devoid of merit. There was no reason to interfere with the trial court's findings of facts and the claim of defamation was sustainable. However, on quantum, there was no legal basis for aggravated damages to be factored into the global award as there was no evidence that the defendants had acted in a high-handed or oppressive or insulting manner to increase the humiliation to the injured plaintiff. In any event, aggravated damages was not properly pleaded for in the claim (see paras 31 & 49).

(4) The global award made by the trial judge was excessive and not in line with the trend of damages awarded by the courts for defamation. The appropriate damages to be allowed was only general damages in the sum of RM50,000 against the first to the third defendants, RM50,000 against the fourth and fifth defendants and RM50,000 against the sixth and seventh defendants. Joint tortfeasors should be liable only to a single award. The first to the third defendants were joint tortfeasors because the suit against them was based on the same impugned statement (ie, Ruslan's press statement). Likewise, a similar situation occurred in relation to the other sets of defendants (see paras 33–34).

[Bahasa Malaysia summary

Empat rayuan ini difailkan oleh tujuh pihak yang disaman secara bersama kerana fitnah di Mahkamah Tinggi oleh mantan Ketua Menteri Pulau Pinang, Lim Guan Eng ('LGE'). Sekitar Ogos 2011, LGE telah mengisytiharkan bahawa dia akan membuat lawatan rasmi ke Sinagpura untuk menarik pelabur ke Pulau Pinang. Salah seorang daripada perayu, Ruslan bin Kassim ('Ruslan'), yang merupakan mantan ketua maklumat Pertubuhan Pribuni Perkasa Malaysia ('Perkasa'), telah mengeluarkan kenyataan akhbar menyoalkan sama ada, semasa mereka berada di Sinagpura, LGE dan dua rakyat Malaysia yang lain (('Azman Yahya' dan 'Kalimullah Hassan') telah mengadakan 'mesyuarat rahsia' bersama pemimpin kanan pihak pemerintah Singapura ('PAP') untuk membincangkan 'rahsia negara' dan, jika itu adalah benar, rakyat Malaysia berhak mempersoalkan pengataan dan taat setia tiga rakyat Malaysia tersebut terhadap negara mereka. Ruslan telah mengahantar kenyataanya kepada dua penerbit akhbar Malaysia untuk penerbitan. Artikel-artikel berkenaan kenyataannya telah disiarkan dalam *Sunday Times*, *Berita Minggu* dan *Mingguan Malaysia* dan juga laman web Perkasa. Selepas perbicaraan penuh, hakim perbicaraan memutuskan bahawa kenyataan Ruslan sebagaimana diterbitkan adalah berunsur fitnah tentang LGE. Hakim menolak pembelaan justifikasi, ulasan adil, perlindungan bersyarat dan pembelaan *Reynold* yang ditimbulkan oleh pelbagai defendan. Ini sebahagian besarnya adalah kerana: (a) Ruslan berikutan itu telah memohon maaf secara awam kepada Azman Yahya tentang artikel-artikel yang dipersoalkan manakala salah satu daripada penerbit akhbar itu, *New Straits Times Press (M) Bhd*, telah mengeluarkan permohonan maaf yang sama kepada Kalimullah Hassan dengan menyatakan bahawa kandungan artikel-artikel yang dipersoalkan dalam penerbiatannya adalah tidak berasas; (b) defendan-defendan berkenaan tidak mempli butiran yang perlu dalam pembelaan mereka sebagaimana dikehendaki di bawah A 18 k 12 dan A 78 k 3(2) Kaedah-Kaedah Mahkamah 2012 ('KM'); (c) artikel-artikel yang dipersoalkan bukan ulasan atau berasaskan fakta; (d) defendan-defendan tidak mempunyai kepercayaan jujur dalam kebenaran artikel-artikel yang dipersoalkan; (e) terdapat niat jahat di mana artikel-artikel yang dipersoalkan telah diterbitkan secara semborono tanpa apa-apa usahan untuk mengesahkan sama ada ianya benar; dan (f) defendan-defendan tidak mempunyai kewajipan sah atau moral untuk menerbitkan artikel-artikel yang dipersoalkan dan juga tida kewajipan sama atau kepentingan di pihak awam untuk menerima maklumat yang mengandungi artikel-artikel tersebut. Hakim perbicaraan mengawardkan LGE sejumlah menyeluruh RM550,000 sebagai ganti rugi am dan teruk terhadap defendan-defendan. Perayu-perayu telah memfailkan rayuan ini kepada Mahkamah Rayuan ('MR') terhadap liabiliti dan kuantum manakala LGE telah membuat rayuan balas untuk jumlah ganti rugi ditambah. Setelah panel hakim MR membuat keputusan sebuat suara berkaitan empat rayuan itu, tetapi sebelum penyampaian keputusan mereka, panel yang sama telah mendengar dan memutuskan satu rayuan lain (*Utusan*

Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob [2016] 5 MLJ 56) dari Mahkamah Tinggi yang mana Menteri Besar Pahang telah menyaman defendan kerana fitnah berhubung satu artikel yang telah diterbitkan dalam satu surat khabar. Rayuan itu adalah terhadap keengganan Mahkamah Tinggi membenarkan defendan membatalkan guaman di bawah A 18 k 19 KM. Isu utama dalam rayuan tersebut adalah sama ada Menteri Besar Pahang telah dihalang daripada menyaman untuk fitnah dalam kapasitinya berdasarkan prinsip *Derbyshire* dalam kes House of Lords *Derbyshire County Council v Times Newspapers Ltd and others* [1993] 1 All ER 1011. Prinsip *Derbyshire* memutuskan bahawa kerajaan yang dipilih secara demokratik hendaklah terbuka kepada kritikan awam yang tidak dihalang dan ia adalah bertentangan dengan kepentingan awam untuk membenarkan kerajaan/badan kerajaan dan mereka yang memegang jawatan awam untuk menyaman kerana fitnah mereka yang mengkritik mereka berdasarkan pelaksanaan kewajipan awam mereka kerana ia akan mewujudkan belenggu yang tidak diingini pada kebebasan bersuara dan tidak menggalakkan ketelusan dan tadbir urus yang baik. Dalam kes itu, panel MR memutuskan bahawa plaintif telah menyaman untuk fitnah dalam kapasiti rasminya dan oleh itu prinsip *Derbyshire* adalah terpakai terhadapnya dan rayuan defendan patut dibenarkan.

Diputuskan, sebulat suara mengguna pakai prinsip undang-undang dalam kes *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* kepada rayuan-rayuan ini dan dengan itu membenarkan keempat-empat rayuan tersebut, menolak rayuan balas dan mengetepikan keputusan mahkamah perbicaraan:

(1) Guaman daripada mana rayuan-rayuan ini berpunca daripada adalah sama dengan guaman dalam kes *Utusan Melayu (M) Bhd v Dato' Sri Diraja Haji Adnan Hj Yaakob* yang mana plaintif-plaintif dalam kedua-dua guaman adalah Ketua Menteri atau Menteri Besar kerajaan negeri berkaitan dan menyaman dalam kapasiti rasmi mereka. Hakim perbicaraan dalam rayuan-rayuan ini telah membuat dapatan beliau berhubung fitnah dan mengawardkan ganti rugi semata-mata mengenai fakta bahawa LGE adalah Ketua Menteri Pulau Pinang. LGE juga telah merayu balas terhadap ganti rugi yang tidak mencukupi kerana reputasi dan maruahnya sebagai ahli politik telah tercemar. Tiada apa-apa untuk mencadangkan bahawa tuntutan LGE adalah apa-apa selain dalam kapasiti rasminya. Justeru, tiada isu tentang pemakaian prinsip *Derbyshire* terhadap fakta dan keadaan rayuan-rayuan ini. Akibatnya, tuntutan LGE terhadap defendan patut ditolak (lihat perenggan 46–48).

(2) Jikapun ia diandaikan seketika bahawa prinsip *Derbyshire* bukan sebahagian daripada undang-undang negara berhubung fitnah atau bahawa kes defendan tidak secara prinsipnya bergantung kepada prinsip undang-undang biasa, prinsip dari segi fakta dan undang-undang jelas berpunca daripada, dan telahpun termaktub dalam, perkara 10(1)(a)

Perlembagaan Persekutuan yang menjamin hak kebebasan bersuara dan meluahkan pendapat. Hak tersebut merangkumi hak rakyat untuk membincangkan tentang kerajaan dan yang memegang jawatan awam dalam pelaksanaan urus tadbir awam negeri. Berlandaskan itu, dan sebagaimana ditentukan oleh kepentingan awam, satu kerajaan yang diundi secara demokratik dan pegawai-pegawainya sepatutnya terbuka kepada kritikan awam. Setiap rakyat yang bertanggungjawab tidak patut dalam apa cara terbelenggu dalam kenyataannya jika ia berkaitan urus tadbir awam kerajaan. Apa-apa tindakan bertentangan akan berlawanan dengan kepentingan awam dan secara langsung menjejaskan hak asasi sebagaimana dijaminkan, kecuali sebaliknya diperuntukkan oleh undang-undang persekutuan (lihat perenggan 44).

(3) Setakat mana merit rayuan-rayuan ini adalah berkaitan (iaitu, tanpa pemakaian prinsip *Derbyshire*), semua isu-isu yang ditimbulkan oleh perayu-perayu adalah tanpa merit. Tiada sebab untuk campur tangan dengan dapatan fakta mahkamah perbicaraan dan tuntutan untuk fitnah adalah mampan. Walau bagaimanapun, berdasarkan kuantum, tiada asas undang-undang untuk ganti rugi yang teruk untuk dimasukkan ke dalam award keseluruhan kerana tiada keterangan bahawa defendan-defendan telah bertindak secara menindas atau menghina untuk menambah rasa hina kepada plaintif yang terjejas. Dalam apa keadaan, ganti rugi yang teruk tidak dipli sepatutnya dalam tuntutan ini (lihat perenggan 31 & 49).

(4) Keseluruhan award yang dibuat oleh hakim perbicaraan adalah berlebihan dan tidak selaras dengan trend ganti rugi yang diawardkan oleh mahkamah untuk fitnah. Ganti rugi yang bersesuaian untuk dibenarkan hanyalah ganti rugi am sejumlah RM50,000 terhadap defendan-defendan pertama hingga ketiga, RM50,000 terhadap defendan-defendan keempat dan kelima dan RM50,000 terhadap defendan-defendan keenam dan ketujuh. Pelaku tort bersama hanya perlu bertanggungjawab untuk satu award. Defendan-defendan pertama hingga ketiga adalah pelaku tort kerana guaman terhadap mereka adalah berdasarkan kenyataan sama yang dipersoalkan (iaitu, kenyataan akhbar Ruslan). Begitu juga, situasi sama berlaku berkaitan pasangan defendan yang lain (lihat perenggan 33–34).]

Notes

For cases on freedom of speech, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 551–553.

Cases referred to

Adam v Ward [1917] AC 309, HL (refd)

Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin [2011] 8 MLJ 608; [2011] 8 CLJ 574, HC (refd)

Dato' Musa Hitam v SH Alattas & Ors [1991] 1 CLJ 314; [1991] 2 CLJ Rep 487, HC (refd)
Datuk Harris bin Mohamad Salleh v Abdul Jalil bin Ahmad & Anor [1984] 1 MLJ 97; [1983] 2 CLJ 211; [1983] CLJ Rep 521 (refd)
Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding [1979] 2 MLJ 185 (refd)
Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat [2012] 2 MLJ 807, HC (refd)
Derbyshire County Council v Times Newspapers Ltd and others [1993] 1 All ER 1011, HL (folld)
Flood v Times Newspapers Ltd [2012] UKSC 11, SC (refd)
Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor [2007] MLJU 894; [2008] 2 CLJ 814, HC (refd)
JB Jeyaratnam Joshua Benjamin v Goh Chok Tong [1983-1984] SLR(R) 745 (refd)
Jameel (Mohammed) and another v Wall Street Journal Europe Sprl [2007] 1 AC 359, HL (refd)
Joshua Benjamin Jeyaretnam v Goh Chok Tong [1989] 3 MLJ 1, PC (refd)
Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors [2001] 2 CLJ 385, CA (folld)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394; [2012] 2 CLJ 619, HC (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals [1995] 2 MLJ 493; [1995] 2 CLJ 912, CA (refd)
Mirzan bin Mahathir v Star Papyrus Sdn Bhd [2000] 6 MLJ 29; [2000] 5 CLJ 507, HC (refd)
Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609, HL (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ 771; [1988] 1 CLJ Rep 233, SC (refd)
Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320; [2010] 7 CLJ 885, HC (refd)
Tun Datuk Patinggi Haji Abdul-rahman Ya' Kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob [2016] 5 MLJ 56; [2016] 5 CLJ 857, CA (folld)

Legislation referred to

Societies Act 1966 s 9(c)
Federal Constitution art 10, 10(1)(a)
Rules of Court 2012 O 18 rr 12, 19, O 78 r 3(2)

Rueben Mathiavaranam (Suflan TH Liew & Partners) in Appeal Nos W-02(NCVC)(A)-685–04 of 2015 and W-02(NCVC)(A)-686-04 of 2015 for the appellants.
PG Cyril (Fahmi Adilah with him) (Cyril Zhafri & Co) in Appeal No W-02(NCVC)(A)-695–04 of 2015 for the appellant.

Adnan Seman (Adnan Sharida & Assocs) in Appeal No W-02(NCVC)(A)-696–04 of 2015 for the appellant.
Americk Sidhu (Americk Sidhu) in Appeal Nos W-02(NCVC)(A)-685–04 of 2015, W-02(NCVC)(A)-686–04 of 2015, W-02(NCVC)(A)-695–04 of 2015 and W-02(NCVC)(A)-696–04 of 2015 for the respondents.

Rohana Yusuf JCA:

[1] All the four appeals lodged by the defendants before us, are pursuant to a civil action for defamation at the Kuala Lumpur High Court, by the Chief Minister of Penang, Lim Guan Eng. After a full trial, the learned trial judge found all the defendants liable to the claim of the plaintiff and ordered for damages and costs to be paid by the respective defendants. We have heard all the four appeals together, and had allowed the appeals by all the defendants. Our reasons follow.

[2] For convenience, in this judgment we will refer to the parties as they were referred to at the trial. The appeals by the defendants are both on the issue of liability as well as quantum. While the plaintiff is cross-appealing on quantum. These four appeals are:

(a) Appeal No W-02(NCVC)(A)-685–04 of 2015 by the fourth and fifth defendants (Syed Nadri bin Syed Harun and The New Straits Times Press (M) Sdn Bhd);

(b) Appeal No W-02(NCVC)(A)-686–04 of 2015 by the sixth and seventh defendants (Abdul Aziz bin Ishak and Utusan Melayu (M) Bhd);

(c) Appeal No W-02(NCVC)(A)-695–04 of 2015 by the first defendant (Ruslan bin Kassim); and

(d) Appeal No W-02(NCVC)(A)-696–04 of 2015 by the second and third defendants (Dato' Ibrahim bin Ali and Pertubuhan Pribumi Perkasa Malaysia).

[3] The plaintiff is and was at all material times, the Chief Minister of Penang, the State Assemblyman of Air Puteh and the elected Member of Parliament for Bagan. From 11–12 August 2011, the plaintiff made an official trip to Singapore for the purpose of developing investment potentials. There was a media statement as found at p 154, *rekod rayuan Jld* 2(1) issued by Setiausaha Akhbar of the Chief Minister on 12 August 2011, on the visit. The media statement explained the visit was to promote amongst others, medical tourism. There was also a dinner organised in Singapore in the course of that visit, which was attended by Datuk Seri Kalimullah Hassan, as well as the Chief Executive of Temasek Holdings, together with other officers of the plaintiff.

A **[4]** The first defendant (information chief of Perkasa) having been aware of that trip about less than two months later had on 1 October 2011 issued a press statement relating to the plaintiff's trip. The press statement of the first defendant began by posing a question whether the plaintiff attended a meeting in Singapore on 12 August 2011 together with Datuk Muhammad Azman B Yahya and Datuk Seri Kalimullah Hassan. Then the press statement sought for meeting agenda to be disclosed, and questioned if Datuk Azman and Datuk Seri Kalimullah had previously organised such meeting between the DAP and PAP. The first defendant then said the whole of Malaysia is entitled to question the loyalty of all these persons mentioned, relating to the trip. C

[5] The first defendant then sent the press statement to the chief editor of the fifth and seventh defendants by way of short messaging services (SMS) which culminated in the publication of the articles based on that press statement in D the various publications. Next day itself on 2 October 2011, the *New Straits Times* published an article in their weekly English language newspaper, the *Sunday Times* entitled 'Three queried over dinner with Singapore politicians', followed by *Berita Minggu* which carried the same subject statement with a title 'Desak perjelas pertemuan sulit DAP, PAP Perkasa percaya Azman, Kalimullah E ada maklumat', *Utusan Melayu (M) Bhd* published an article based on the same story in their Malay language weekly newspaper, *Mingguan Malaysia* entitled 'Kalimullah, Azman perlu jelaskan isu jumpa PAP'.

[6] The plaintiff claimed that the first defendant's press statement and all the F articles published by the defendants pursuant thereto, as referred to in the preceding paragraph had defamed him. It was alleged by the plaintiff that the first defendant either acting personally or, on the authority or complicity with the second and third defendants, had caused the impugned statements to be published in the media. That similar statement was published on the website of G the third defendant. The fourth defendant who was the group editor of the *New Straits Times* and *Berita Minggu* was said to be responsible for publishing the statement in both the newspapers. While the fifth defendant was alleged to have distributed the statement both by the mainstream newspapers as well as by way of internet access. The sixth defendant who was the group editor in-chief H of *Mingguan Malaysia*, had been alleged to have caused the statement to be published in the seventh defendant's newspaper. We would refer to the first defendant's press statement and the related articles published in reliance of that press statement collectively, as the 'impugned statements'.

I **[7]** After a full trial, the learned trial judge found that the impugned statements clearly insinuated the plaintiff, as having attended a dinner with senior PAP leaders of the Government of Singapore with questionable motive, had divulged national secrets to those leaders and had thereby compromised his loyalty to Malaysia.

[8] There was no issue in relation to identity and publication of the impugned statements which the learned trial judge need not go through to make a finding of defamation. After which, the learned trial judge embarked on assessing the various defences raised by the defendants. We would sum up the defences raised by the first to third defendants as justification and fair comment. While the fourth to seventh defendant pleaded defences are qualified privilege and *Reynolds*' principle. Having carefully examined the defences the learned trial judge had rejected all the defences raised and found all the defendants liable to the claim. The learned trial judge had thereafter, assessed the appropriate damages for the plaintiff against each defendant and awarded the damages to the plaintiff.

THE APPEAL

[9] The common grounds of appeal advanced by the defendants can be summarised into two broad categories. First, the defendants are not satisfied with the finding by the learned trial judge that the impugned statements are defamatory of the plaintiff. As for the first defendant it was contended that the impugned statements were nothing more than legitimate queries on the reasons for the official visit to Singapore, which allegedly was not disclosed to the public. Hence, the first defendant maintained that his press statement was not defamatory of the plaintiff. The next ground of appeal raised by all the defendants is that the learned trial judge had failed to give appropriate consideration to the defences raised by each of the defendants before her.

[10] Meanwhile, the second and third defendants attempted to raise specific issue on the locus of the third defendant as a registered society. It was contended that the third defendant being a society registered under the Societies Act 1966, cannot be sued in that capacity. Section 9(c) of the Act requires for a society to be sued in the name of its registered public officer. It was the third defendant's case that, the suit against the third defendant is a non-compliance with the Societies Act 1966. It was the case of these defendants that the second defendant who was then the President of the third defendant society, was named in his personal capacity and could not be said to assume the office-bearer of the third defendant, to enable compliance with s 9(c).

[11] Before we delve into the two main grounds of appeal raised by the defendants, we propose to first deal with the issue on the locus standi of the third defendant. We note that this issue was not brought before the learned trial judge. It is being raised for the first time before us in this appeal. In our view, this objection should have been raised as a preliminary issue and not after the completion of trial. Definitely, it should not be an issue at the appellate stage as this. It is not disputed that there was no officer or office-bearer named or

declared by the Registrar of Society as a public officer, under s 9(c) in respect of the third defendant.

[12] What is pretty obvious is that s 9(c) which is reproduced below, allows a claim against a registered society in the name of any office bearer if none is named or declared by the Registrar:

> 9(c) a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any of the office-bearer of the society.

[13] The third defendant had gone through a full cycle of a trial, only to realise at the appeal stage, that it was not properly cited as a party in the suit. We cannot find a better way to describe this than a sheer afterthought. The third defendant in our view, had waived any right to object on the same. The second defendant who was then the President of Pribumi Perkasa, (the third defendant) would appropriately fit the requirement of s 9(c), he being the main office-bearer of the society. The second defendant had been described at para 3 of the statement of claim as 'the Principal Officer of Pertubuhan Pribumi Perkasa Malaysia (Perkasa)'. In the defence of the first to third defendants, this part of the statement of claim is admitted. The second defendant cannot now deny that he had in fact assumed the position as the office-bearer of the third defendant in the suit. Having done so and having proceeded in the trial without raising any objection, he had already waived his challenge on the issue of locus. As such we find this ground of appeal by the second and third defendants is devoid of any merit.

[14] We now come to the first main ground of appeal raised by all the defendants. We agree with the finding made by the learned trial judge that the impugned statements are defamatory of the plaintiff. In arriving at that finding, the learned trial judge had gone through a thorough and proper examination of the impugned statements and had employed a well-established legal principle in doing so. It would be appropriate to reproduce the press statement of the first defendant which forms the basis of the other publications, to better appreciate the issues at hand. The full text of the statement is as below:

> PERKASA 01102011: Perkasa meminta Datuk Muhamad Azman Yahya tampil memberikan penjelasan, betulkah pada 12hb Ogos 2011 yang lalu Datuk Seri Kalimullah Hassan dan Lim Guan Eng Setiausaha Agung DAP dan Ketua Menteri Pulau Pinang telah mengadakan pertemuan sulit di samping makan malam bersama dengan seorang pemimpin kanan daripada Parti PAP di Singapura.
>
> Jika benar maka kita ingin tahu apakah agenda yang telah dibincangkan oleh ketiga-tiga mereka pada malam tersebut? Apakah ianya berkaitan dengan rahsia negara?

Perkasa juga ingin tahu daripada Datuk Muhamad Azman Yahya ... betulkah Datuk Seri Kalimullah Hassan telah kerap kali mengatur perjumpaan antara pemimpin-pemimpin DAP dengan pemimpin-pemimpin PAP dari Singapura? ... Jika benar maka seluruh rakyat Malaysia berhak mempersoal dan mempertikaikan di manakah Kiblat, kesetiaan dan loyalty mereka sekarang? ...

Perkasa ingin memberi amaran kepada seluruh rakyat Malaysia jangan ada di antara kita yang cuba untuk menjadi alat atau ejen Negara asing dan cuba untuk menjadi petualang di negaranya sendiri. Ingatlah pesanan orang tua-tua di mana bumi dipijak di situlah sepatutnya langit dijunjung. Kalau tak ada angin masakan pohon bergoyang.

Ruslan Kasim,

Ketua Penerangan Perkasa Malaysia

1hb Okt 2011.

[15] It was in reliance on the above press statement of the first defendant that all the other publications as stated in para 5 were made. The learned trial judge had carefully examined the impugned statements and had read all of them together in the proper context to form her conclusion that the impugned statements are defamatory of the plaintiff. She had explained as to how she had arrived at her conclusion and had substantiated her finding on well-reasoned grounds. The learned judge had in that process, taken a proper step in examining the statements when it was observed at paras 25–26 of the judgment that:

25. Peringkat pertama melibatkan plaintif memikul beban untuk membuktikan, atas imbangan kebarangkalian, kesemua tiga elemen yang berikut:

(a) Perkataan-perkataan yang diadukan mestilah mampu membawa suatu pengertian memfitnah;

(b) Perkataan-perkataan yang diadukan mestilah merujuk kepada plaintif;

(c) Perkataan-perkataan yang diadukan mestilah disiarkan oleh defendan kepada pihak ketiga.

26. Hanya setelah plaintif berjaya membuktikan ketiga-tiga elemen tersebut dalam peringkat pertama itu, maka inkuiri dalam sesuatu kes fitnah akan memasuki peringkat kedua di mana beban beralih kepada defendan-defendan untuk membuktikan pembelaan yang diplid atau bahawa perkataan-perkataan yang diadukan bukan pernyataan fitnah.

[16] In our view, the learned trial judge had arrived at a correct conclusion after giving a careful assessment of the impugned statements. Her Ladyship had rightly construed that the words complained of are capable of and are in fact defamatory of the plaintiff. In doing so, the learned judge had employed the well accepted legal process of firstly determining that the words used must be given plain ordinary meaning to the ordinary reasonable person using general

knowledge and common sense. And that the impugned statements must be construed in their proper contexts and must be read as a whole. The learned trial judge had cited and relied on the principles enunciated in the cases of *Tun Datuk Patinggi Haji Abdul-rahman Ya' Kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, *JB Jeyaratnam Joshua Benjamin v Goh Chok Tong* [1983–1984] SLR(R) 745, *Irene Fernandez v Utusan Melayu (M) Sdn Bhd & Anor* [2007] MLJU 894; [2008] 2 CLJ 814. We have no reason to disturb the said findings of the learned judge and agreed that applying the generally accepted test, the words complained of, are indeed defamatory of the plaintiff.

[17] The next main ground of appeal raised by the defendants is on the alleged failure of the learned trial judge to appreciate the defences raised by each of them. Now, on the defence of justification raised by the first, second and third defendants, the learned trial judge rightly held that the burden is on the defendants to prove justification, that the impugned words were in fact true, as enunciated by the decision of the Supreme Court in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ 771; [1988] 1 CLJ Rep 233. The learned trial judge further, did not find the first to third defendants to have pleaded the necessary particulars required under O 18 r 12 of the Rules of Court 2012, and as decided in *Mirzan bin Mahathir v Star Papyrus Sdn Bhd* [2000] 6 MLJ 29; [2000] 5 CLJ 507. The pleading on justification was done only in general terms as found in their pleaded defences. In any case, the learned trial judge dismissed the defence of justification because the impugned statements were not true as evidenced from the content of apology extended by the first defendant to Datuk Azman (at p 157 of the respondent's core bundle) who had been equally mentioned alongside the plaintiff, in the impugned statements. Another apology by the fifth defendant to Datuk Seri Kalimullah at p 159 of the same bundle of the appeal records, contained a statement to the effect that the publication was baseless. It was also plainly baseless that the trip was a secret one as alleged, when the press secretary of the plaintiff had in fact issued a media statement on that trip. In that media statement, the reason for the visit was clearly stated as in pursuit of investment potential. Thus the press statement of the first defendant accusing that the trip was a secret one was also completely baseless and cannot be defended on the defence of justification.

[18] The learned trial judge went on to deliberate on the defence of fair comment raised by the first to third defendants. In this regard, we find the learned trial judge had correctly applied the law, where at para 68 of the judgment, Her Ladyship stated this:

> 68. Defendan pertama tidak boleh menggunakan pembelaan ulasan saksama apabila beliau sendiri sebenarnya tidak mengetahui tentang kesahihan fakta yang diperkatakannya. Beliau tidak mengetahui secara khusus sumber maklumatnya. Dalam keterangannya defendan pertama menyatakan bahawa beliau memperoleh maklumat tersebut melalui pembacaan beliau dalam laman web tetapi tidak ingat

laman website yang mana satu. Selain itu beliau juga ada mendengar mengenai berita tersebut daripada perbincangan-perbincangan di kalangan ahli dan pemimpin. Tidak ada saksi yang dikemukakan untuk menyokong keterangan beliau tentang sumber maklumatnya. Sumber maklumatnya yang diterbitkannya ternyata tidak betul sebagaimana pengakuan yang dibuat oleh beliau sendiri, dan oleh defendan kelima dan defendan ketujuh dalam permohonan maaf masing-masing kepada Datuk Azman dan Datuk Seri Kalimullah.

[19] We agree with the learned trial judge that the defence of fair comment raised by the defendants is totally misplaced and should be rejected. The learned trial judge was correct in doing so because the defence of fair comment is only applicable where the statement is first of all a comment, which is based on some true facts (see *Joshua Benjamin Jeyaretnam v Goh Chok Tong* [1989] 3 MLJ 1 (PC)). The defendants had failed on this first requirement alone, to sustain such a defence because the impugned statements were not comments and were not based on any fact. Also, the defendants failed to plead this defence as per the requirement of O 78 r 3(2) of the Rules of Court 2012. Under this rule, the defendants are duty-bound to particularise the facts relied upon to support such a defence. This requirement was not adhered to by the defendants.

[20] Vis a vis the defence of the fourth, fifth, sixth and seventh defendants, the learned trial judge had dismissed the defence of qualified privilege on the reason that this defence requires the presence of honest belief which was lacking in this case. A publication of untrue defamatory matter made recklessly, without considering its truth would be treated as though it is known to the maker that they are false. The fourth to seventh defendants had failed to establish that there was an honest belief in the truth of what they had published.

[21] Ultimately, the learned trial judge found the presence of malice which had nullified the defence of qualified privilege to the defendants. In her finding that there was malice the learned trial judge had meticulously dealt with this subject from para 87 of her grounds of judgment. Her Ladyship had considered and rejected the evidence of the plaintiff which suggested that there was malice on the part of the fourth to seventh defendants suggesting a collusion between them with Barisan Nasional, to oust him out of power and to capture the Penang State Government. The allegation made against the fourth to fifth defendants that they share the same inspiration, and that UMNO was or still is the majority shareholders in the seventh defendant, were all rejected by the learned judge to form the basis of malice, on the part of these defendants.

[22] The learned trial judge however, in our view had correctly found malice premised on Her Ladyship's own inference like how it was done in *Tun Patinggi*

Hj Abdul Rahman Ya'kub. And that is a publisher of an untrue defamatory matter who recklessly, without considering or caring its truthfulness or otherwise should be treated as if he knew it to be false. The learned trial judge considered the cases cited in support of the defendants on this issue in *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2007] 1 AC 359, *Sivabalan a/l P Asapathy v The New StraitsTimes Press (M) Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885 and *Flood v Times Newspapers Ltd* [2012] UKSC 11.

[23] It was found by the learned trial judge that the defendants cannot rely on these authorities because the application of the laws in the cited cases are fact sensitive. Where she concluded at para 82 of the grounds of judgment that:

> 82. Daripada keterangan yang dikemukakan saya mendapati SD2, SD3 dan defendan keenam dari mula lagi tidak berhasrat untuk membuat verifikasi bukan kerana boikot atau layanan dingin DAP, tetapi kerana keyakinan penuh kepada kredibiliti sumber maklumat mereka, iaitu defendan pertama yang boleh dipercayai dan disegani kerana beliau ialah seorang pemimpin NGO yang kerap mengeluarkan kenyataan yang tidak menimbulkan masalah sebelum ini. Berteraskan keyakinan itu mereka memilih proses penyiaran secara tradisional exhibit P2, P3 dan P4.

[24] The evidence disclosed that the fourth to seventh defendants were reckless and failed to obtain clarification or to verify the truthfulness of the impugned statements, this being the requisite condition to the defence of *Reynolds*' principle, was missing. A *Reynolds*' defence is merely an extension of the defence of qualified privilege reserved for journalists which is often described as responsible journalism. Such a defence is usually accorded to one who invests time and energy investigating into something, before reporting.

[25] A fact found by the learned trial judge on the conduct and practice by the seventh defendant to publish first and wait for reaction the next day, would not accord the defendants the *Reynolds*' privilege. A privileged defence is also defined in *Adam v Ward* [1917] AC 309, as an occasion where the person who makes the communication has an interest, a duty, legal or social or moral to make it, and is made to a person who has corresponding interest or duty to receive it.

[26] The learned trial judge had further found that there was no legal or moral duty on the part of the defendants to publish the impugned statements; neither was there any reciprocal duty or interest for public members to receive the false information which was not verified by the defendants in publishing them. Hence no defence of responsible journalism can even be entertained.

[27] Having perused through the grounds of judgment of the learned trial judge, we are of the view that all the defences raised by the respective

defendants did not escape Her Ladyship's due consideration as each of the defences had been clearly and carefully analysed and deliberated quite meticulously in her grounds of judgment. The contention of the defendants that the learned trial judge lacked appreciation of the defences raised by the defendants is therefore totally groundless.

QUANTUM OF DAMAGES

[28] The learned High Court judge having found all the defendants liable on the claim, had proceeded to award damages to the plaintiff. In the grounds of judgment at para 112 it was observed by Her Ladyship that:

> Saya berpendapat tidak ada kewajaran bagi membuat award bagi gantirugi teladan. Walaupun terdapat alasan bagi mengaward ganti rugi keterlaluan namun begitu mengambil kira semua hal keadaan kes, saya membuat satu global award sebagai gantirugi am dan ganti rugi keterlaluan sebanyak RM550,000 iaitu RM150,000 dibayar oleh defendan pertama, kedua dan ketiga, RM200,000 oleh defendan keempat dan kelima dan RM200,000 dibayar oleh defendan keenam dan ketujuh ...

[29] The learned trial judge did not award exemplary damages but had awarded a global award of damages in the sum of RM550,000 to the plaintiff. The damages awarded constitutes general and aggravated damages. Learned counsel for the plaintiff crossed-appealed on the quantum awarded, to say that the damages awarded was too low because of the heinous libel perpetrated on the plaintiff as an elected Member of Parliament, an elected member of the Penang State Assembly as well as the Chief Minister of Penang. Learned counsel relied on the decision in *Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding* [1979] 2 MLJ 185, followed by two other decisions in *Datuk Harris bin Mohamad Salleh v Abdul Jalil bin Ahmad & Anor* [1984] 1 MLJ 97; [1983] 2 CLJ 211; [1983] CLJ Rep 521 and *Dato' Musa Hitam v SH Alattas & Ors* [1991] 1 CLJ 314; [1991] 2 CLJ Rep 487. In gist, learned counsel submitted that the principles of damages as established in the decided authorities are that:

(a) the higher the plaintiff's position, the heavier damages ought to be;

(b) the libel contained the most vile imaginable as it questioned the loyalty of the plaintiff to the Prime Minister and the Federation of Malaysia; and

(c) the extent of the injury inflicted on the plaintiff is a perfectly legitimate incentive to award a generous sum reflecting aggravated damages.

[30] Besides, factors such as malice as well as the well the dissemination of the impugned statements which reached a wide readership should be indication of how widespread the statements was. These are according to learned counsel, factors which should aggravate damages to the plaintiff.

[31] In this regard, we agree with learned counsel for the defendants that the amount awarded by the learned High Court judge on aggravated damages was incorrect in law. Aggravated damages is usually given in cases involving high handedness or oppressive action. These factors would increase the humiliation to the injured plaintiff. There was no evidence of such before the court in this case. There was no evidence that any of the defendants had acted in a high handed or insulting manner to merit aggravating damages. There was therefore no basis on the part of the learned trial judge to award this head of damages as part of the global award of damages.

[32] Then, we took a look at the trend of damages awarded by the court in a suit of defamation. The days of million Ringgit award for defamation has long gone and consigned to history with the decision of the Court of Appeal in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912. We would begin with the case of *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807. A defamation for an allegation of raping a maid is surely a damaging remark that the plaintiff committed an offence of such nature would damage not only one's reputation but also his political and family live. Damages of RM300,000 was made for compensatory, aggravated and exemplary damages. *Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin* [2011] 8 MLJ 608; [2011] 8 CLJ 574 involves a prominent consultant psychiatrist with international recognisant. He was a known philanthropist. The defamatory remark made was that he had used charity as a front for personal financial gain. He was awarded a sum of RM150 as damages.

[33] Having given our due consideration, we agreed with learned defendants' counsel that the global award made by the learned trial judge was also excessive and not in line with the trend of cases. In *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394; [2012] 2 CLJ 619 despite the plaintiff being a Chief Minister of Penang and a finding of malice in that case, the award made was RM200,000.

[34] In the circumstances, we find the appropriate damages to be allowed is only for an award for general damages. We then make the following order in respect of damages:

(a) RM50,000 against the first to third defendants;

(b) RM50,000 against the fourth and fifth defendants; and

(c) RM50,000 against the sixth and seventh defendants.

We are guided in this regard by the decision of this court in *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385. In that case, it was

enunciated that, joint tortfeasors should be made liable only to a single award. In this appeal, the first to the third defendants are joint tortfeasors because the suit against them was based on the same impugned statement, that is the press statement of the first defendant. Likewise similar situation occurred in relation to the other sets of defendants.

ANOTHER DECISION

[35] Our decision, however, does not end with the above deliberations. There is the matter of the application of 'another decision' which impacted on our decision here. The trial of the plaintiff's claim and the decision of the learned trial judge completed with the grounds of judgment written on 10 June 2015. Before the present appeal came before us, we had the opportunity of hearing another appeal on this subject involving a public figure like the plaintiff. It was a defamation suit which was filed at the High Court of Kuala Lumpur by Dato' Sri Diraja Hj Adnan Hj Yaakob, the Menteri Besar of Pahang against Utusan Melayu (M) Sdn Bhd. That action was in relation to an article published in the newspaper of the respondent therein, which was said to be defamatory of the Menteri Besar. There was an application to strike out the suit pursuant to O 18 r 19 of the Rules of Court 2012, which was dismissed by the High Court at Kuala Lumpur. On appeal before this court which was presided by the same panel, we allowed for the suit to be struck out, reversing, thus the High Court decision (see *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56; [2016] 5 CLJ 857).

[36] The main issue raised in that appeal was on the applicability of the principle as decided by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd and others* [1993] 1 All ER 1011. The underlying principle as enunciated in that case is that, it is of the highest public importance that a democratically elected governmental body or indeed any governmental body, should be opened to uninhibited public criticism. It is premised on the basic tenet that in a free and democratic society, it would be contrary to public interest to permit those who hold office in the government or are responsible for public administration to sue for defamation, because that would place undesirable fetter on freedom of speech.

[37] This principle of law as set out in that case relates to the issue of locus standi of the claimant plaintiff as the Menteri Besar of Pahang. It was raised as a legal issue as to whether a person holding an august public office who should be opened to public criticism in relation to the office he holds, is entitled to sue for defamation. We had in that appeal expressed our view and accepted and applied the principle in *Derbyshire*. We held the view that such principle would apply as it would operate in consonant and in sync with the right to freedom of speech as guaranteed under art 10 of the Federal Constitution. The right to

A open criticism to our mind, is the hallmark of a democratically elected government, the main thrust of which underscores the principle of accountability. This principle cannot operate alongside the prospect of a defamation suit being taken against citizen who is exercising his right to criticise a person who is accountable and open to public scrutiny.

B

[38] We appreciate that, the exercise of the right to fair criticism so as to ensure a transparency and good governance, lies amidst the potential conflict of the right of that other person to the protection of his name and dignity. It is well reasoned that a public figure performing public duties should be opened to be C criticised on the performance of his duties and cannot be defamed in that circumstances. It is for that reason that the principle in *Derbyshire* recognised exception to this general principle. Lord Keith of Kinkel, had laid down this exception as being confined to a suit for defamation in personal capacity.

D

[39] Thus, barring the exception that whenever the private and the personal conduct of a public figure is being put into question, all other conduct falls within the public domain of accountability and would not entitle him to sue in a tort of defamation.

E

[40] We differed in our view with the learned trial judge in that case as to whether the suit filed by the Menteri Besar of Pahang was in his official or personal capacity. The learned trial judge accepted the argument that the suit filed by the Menteri Besar of Pahang in that case was made in his personal F capacity by virtue of the fact that the impugned statement was referring to Dato' Sri Diraja Hj Adnan Hj Yaakob by name, without citing him as the Menteri Besar of Pahang and the name 'Adnan' or 'beliau' had been used instead, at least 20 times in the impugned statement therein. Premised on these reasons, the learned judge concluded that the claim made by the Menteri Besar G was in his personal capacity and not the official one.

[41] We considered the pleadings in that case, and reading them plainly, we concluded that the suit was made in the capacity of the claimant as the Menteri Besar of Pahang. The alleged defamatory statement was clear to our mind that H 'the article, when read as a whole undoubtedly concerns, and the contents thereof revolve around namely the respondent being the Menteri Besar of the State of Pahang, not Dato' Sri Diraja Hj Adnan Hj Yaakob as a person or in his personal capacity'.

I

[42] Having found so, we summarised the principles emanating from all the decisions and the authorities on this subject, at para 17 of that judgment:

(a) a democratically elected government and individual members holding office in the government and are responsible for public administration or

having conduct of the affairs of the government should be open to uninhibited public criticism relating to such public administration and affairs;

(b) it would be contrary to public interest to fetter freedom of speech by restraining public critiques of the government and those holding public office on matters relating to public administration and affairs;

(c) there is no public interest favouring the right of the government and those holding office in the government and are responsible for public administration or having conduct of the affairs of the government to have the right to sue for defamation because to admit such actions would place an undesirable fetter or have an uninhibiting effect on freedom of speech; and

(d) the above principles do not restrict the rights of individuals holding public office from suing in a defamation action in his personal capacity where individual reputation is wrongly impaired.

[43] We had also considered the matter from the perspective of the applicability or otherwise of the common law principle as laid down by the House of Lords in *Derbyshire*. In our view, this subject ought to be appraised from the perspective of the right to discuss or criticise the government and public officials by the citizens in the exercise of the right as enshrined and guaranteed under art 10 of the Federal Constitution.

[44] Common law principle aside, in our judgment, such right is in fact and in law an integral part of the right to freedom of speech and expression, being the basic right guaranteed to every citizen of this country and in any free democratic process. This fundamental right must be given due recognition and protected as one which is duly protected and guarded by the Federal Constitution. Thus, even assuming for a moment that the *Derbyshire* principle is not part of our law on defamation, or that the defendants' case herein does not principally rely on the common law principle, we would say that the principle in fact and in law clearly emanates from and is already well-entrenched in art 10 cl (1)(a) of our Constitution, which guarantees the right to freedom of speech and expression. Such right in our judgment, encompasses the right of the citizens to discuss the government and those holding public office in conducting public affairs and administration of the state. On that score, and as public interest dictates, a democratically elected government and its officials should be opened to public criticism. Every responsible citizen should not be in any way fettered in his statements where it concerns the affairs and public administration of the government. Any action to the contrary would in our view, militate against public interest and directly affect the fundamental right as guaranteed, unless otherwise provided by a federal law.

[45] We took note on the consensus of both learned counsel for the appellant and the respondent in that case, on the applicability of the *Derbyshire* principle. To be further noted, counsel for the plaintiff in this appeal, Encik Americk Sidhu was the same counsel for the respondent Menteri Besar in that case, who maintained his position and did not oppose the application of the *Derbyshire* principle to be part of our law of defamation and its jurisprudence. Learned counsel, like anyone else who believes in a democratically elected administration readily accepted the applicability of the principle and had only opposed that appeal on the sole reason that his client was suing in his personal capacity and cannot be subjected to that principle.

[46] Returning now to the present appeals, we maintain our similar view in the present appeal with the one in *Dato' Sri Diraja Hj Adnan Hj Yaakob*. We find striking similarities in the nature of the suit between that case to the one in the present suit. Both the plaintiffs are the Chief Ministers or Menteri Besar of the relevant State Government and suing in their capacities of their respective offices. The pleadings in this case is clear that the plaintiff's suit is made in his capacity, as the Chief Minister of Penang, the State Assemblyman of Air Puteh and the elected Member of Parliament for Bagan. Likewise, throughout the judgment of the learned judge, it is apparent that Her Ladyship was determining and making her finding of defamation, as well as awarding damages solely on the fact that the plaintiff is a Chief Minister of Penang.

[47] The submissions on damages is premised on the exact position of the plaintiff being the Chief Minister. It is also the ground relied by learned counsel that the damages awarded by the learned judge was insufficient because the plaintiff's reputation and dignity as a politician had suffered much injury. There is nothing to suggest that the claim of the plaintiff is anything but in his official capacity less the allegation of defamation may not even be sustainable. The findings of the learned trial judge was solely premised on the fact that the impugned statements were defamatory of the plaintiff on the basis of his official capacity. In the words of the learned trial judge at para 35:

> ... Saya mendapati perkataan-perkataan yang dibaca secara keseluruhannya walaupun dalam bentuk permintaan dan pertanyaan mempersoalkan mengenai *kesetiaan plaintiff sebagai Ketua Menteri Pulau Pinang* dan sebagai rakyat Malaysia kepada Negaranya ... (Emphasis added.)

[48] We agree with the learned trial judge that the claim of the plaintiff is made in his official capacity. Hence, there is no issue of the applicability of the exception to the *Derbyshire* principles in the facts and circumstances of the present appeal. The application of the *Derbyshire* principles, as conceded by learned counsel, consequently meant that the plaintiff's claim must be dismissed.

OUR DECISION

[49] Having heard the submissions on merits of these appeals, we find all the issues raised by the defendants as devoid of merit. We agree with the findings of facts made by the learned trial judge and we have no reason to intervene with her finding of facts, that the claim of defamation is sustainable. On quantum, we however agree with counsel for the defendants that the award on aggravated damages was made without any legal basis and the learned trial judge had fallen into error in awarding aggravated damages as part of the global award as stated in the grounds of judgment. In any event, no aggravated damages was properly pleaded in the claim. It is to be noted that in the fair order at pp 6–7 of the appeal records Vol 1, there was no mention of aggravated damages though it forms part of the reasons for awarding the global damages.

[50] We are not in agreement with the learned trial judge and we would have awarded general damages in the sums as we have stated in para 34 of this judgment. Consequently the cross-appeal of the plaintiff is dismissed.

[51] After our decision was made in respect of these four appeals, our decision in *Dato' Sri Diraja Hj Adnan Hj Yaakob* was brought for the determination at the Federal Court. The appeal by the Menteri Besar in that case was allowed. In the result, the order for striking out made by us was set aside by the Federal Court. We have had no benefit of the decision or grounds of judgment as to applicability or otherwise of the principle in *Derbyshire*.

[52] We have therefore followed our earlier decision, that the principle of law in the *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* (*Utusan Melayu*) applies to the facts and circumstances of the present appeals. On this ground alone, we allowed all the four appeals before us. We ordered for costs to be borne by each party and we set aside the decision of the learned High Court judge.

[53] Both my learned brother Idrus Harun JCA, and my learned sister Mary Lim Thiam Suan JCA, have read this judgment in draft. They have expressed their agreement on the same.

Order accordingly.

Reported by Ashok Kumar